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Nos. 00-1751, 00-1777 & 00-1779

IN THE

Supreme Court of the United States

SUSAN TAVE ZELMAN, SUPERINTENDENT OF PUBLIC INSTRUCTION OF OHIO, *et al.*, *Petitioners*,

v.

DORIS SIMMONS-HARRIS, *et al.*, *Respondents*.

HANNA PERKINS SCHOOL, *et al.*, *Petitioners*,

v.

DORIS SIMMONS-HARRIS, *et al.*, *Respondents*.

SENEL TAYLOR, *et al.*, *Petitioners*,

v.

DORIS SIMMONS-HARRIS, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMERICAN EDUCATION REFORM COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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This *amicus curiae* brief is submitted in support of the Petitioners in these consolidated cases. By letters filed with the Clerk of the Court, all parties have consented to the filing of this brief.[1]

INTEREST OF *AMICUS CURIAE*

The American Education Reform Council (AERC) is a Milwaukee-based non-profit organization whose mission is to provide accurate and credible information about school choice. A long-established school-choice program together with a strong charter-school program make Milwaukee an active laboratory for education reform. AERC regularly plans and conducts study tours to explain Milwaukee's school-choice program. Visitors include elected officials, religious leaders, community activists, and members of the media—both supporters and opponents of choice—who seek a fuller understanding of the impact of school choice in a community.

Because of its experience in Milwaukee, AERC believes that it can provide information and analysis about school choice that will be helpful in resolving the legal issues in this case. Drawing on this experience, AERC seeks in this brief to persuade the Court that school choice promotes both better education and greater fairness; that school choice works; and that school choice is constitutional.

SUMMARY OF ARGUMENT

I. School-choice programs improve educational achievement in failing school districts. Students from poor families are often trapped in substandard public schools because their

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part and no person or entity other than *amicus* and its counsel made a monetary contribution to the preparation or submission of this brief.

parents cannot afford private schools or to move to better school districts. School-choice programs help to equalize educational opportunity by giving poor parents some of the educational choices that families of greater means take for granted, and rigorous empirical studies show that students who receive vouchers and attend private schools improve their academic performance. Just as important, empirical evidence shows that voucher programs, by stimulating competition, motivate underperforming public schools to improve. Promising experiments such as Cleveland's voucher program should be permitted to continue.

II. Cleveland's voucher program is not "an establishment of religion." Under the approaches of a majority of the Court in *Mitchell v. Helms*, 530 U.S. 793 (2000), the Cleveland program is constitutional because it has a secular purpose, is neutral towards religion both on its face and in its application, and assists religious schools only as a result of private choices by individual recipients of aid who are free to spend the aid where they choose. The program is neutral because it provides benefits to a broad class of citizens without regard to religion and does not give students or their families any financial incentive to choose a religious school over a secular school. The Sixth Circuit's concern that only a small number of secular schools currently participate in the program is misplaced: the participation level of secular schools reflects the newness of the program and the legal uncertainty that has shadowed the program through virtually its entire history. Experience elsewhere suggests that more opportunities to use vouchers at secular schools will develop over time once legal uncertainties are removed. This Court's decision in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), on which the Sixth Circuit relied heavily, is distinguishable and, in any event, is inconsistent with the Court's more recent jurisprudence.

ARGUMENT

I. VOUCHER PROGRAMS HELP TO EQUALIZE EDUCATIONAL OPPORTUNITY AND TO BRING COMPETITIVE FORCES TO BEAR TO IMPROVE FAILING PUBLIC SCHOOLS.

The educational benefits of school choice programs are clear. The evidence shows that expanding educational options for low-income parents can improve an entire urban education system—increasing both the educational achievement of voucher recipients and (through competition) the educational quality of inner-city public schools. The Ohio Legislature adopted the Ohio Pilot Project Scholarship Program (the "Cleveland Scholarship Program" ("CSP")) to achieve these educational benefits in the state's most distressed school district. This state's experimental effort to solve an educational crisis should be encouraged, not obstructed, by the courts.

A. Vouchers Help To Equalize Educational Opportunity.

The parents of America's schoolchildren do not have equal educational opportunity. The poorest children, and particularly minorities, are often trapped in failing public schools in the inner cities, while more affluent children have the opportunity to attend private schools or better public schools. Vouchers attempt to reduce this disparity by giving poor parents more options for educating their children. The evidence shows convincingly that vouchers work, significantly improving the educational achievement of students who receive them.

The right of parents to send their children to the school of their choice is guaranteed by the Constitution, *see Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), but this right is largely illusory for low-income parents who can afford neither private-school tuition nor the cost of housing in

neighborhoods with better public schools. Even parents who could afford to pay some tuition often cannot realistically afford to turn down the free-tuition option provided by local public schools. The U.S. Department of Education found in 1997 that 41 percent of elementary and secondary students effectively had no choice in the school they attended, and that children from families with incomes over $50,000 were "much less likely" than children from poorer families to attend "an assigned public school over which they had not exercised any choice."[2] Though the law, in its majestic equality, gives rich and poor alike the constitutional right to choose, the poor often have no actual choice other than an assigned inner-city school.[3]

No one doubts that in many urban school systems the achievement gap between white students and minority students is unacceptably wide. New results from the National Assessment of Educational Progress (NAEP)—the most respected and comprehensive source of national education data[4]—are particularly disheartening. The NAEP classifies students' educational performance into three categories—Advanced, Proficient, and Basic. For fourth-graders, the Ba-

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2 U.S. Dep't of Educ., National Ctr. for Educ. Statistics, *Findings from The Condition of Education 1997: Public and Private Schools: How Do They Differ?*, at 4-5 (July 1997), *available at* http://nces.ed.gov/pubs97/97983.pdf.

3 The phrase is from Anatole France, *The Red Lily* ch. 7 (1894) ("The law, in its majestic equality, forbids the rich and poor alike to sleep under bridges, beg in the streets or steal bread.").

4 Commonly known as the "The Nation's Report Card," the NAEP measures academic achievement of 4th, 8th, and 12th grade students in reading, mathematics, and other subjects. *See* U.S. Dep't of Educ., Office of Educ. Research and Improvement, National Ctr. for Educ. Statistics, *The Nation's Report Card: Fourth-Grade Reading 2000* (Apr. 2001) ("*NAEP Fourth-Grade Reading 2000*"), *available at* http://nces.ed.gov/nationsreportcard/pdf/main2000/2001499.pdf.

sic category in reading requires only that students be able to "demonstrate an understanding of the overall meaning of what they read" and "make relatively obvious connections between the text and their own experiences and extend the ideas in the text by making simple inferences."[5] Yet last year, 60 percent of fourth-graders from families in poverty (defined by eligibility for federal school-lunch aid) had reading skills *below* the Basic level; by contrast, 27 percent of non-poor fourth-graders could not meet that minimal measure of competence.[6] Forty-seven percent of fourth-graders in urban schools read below Basic, compared to 32 percent of students in suburban areas and large towns.[7] And 63 percent of African-American and 58 percent of Hispanic-American fourth-graders read below the Basic level, compared to 27 percent of whites.[8]

In response to such educational disparity, elected state officials have enacted school-choice programs to help students from poor families in low-performing public schools. These programs, born of decades of frustration with inner-city public schools, give such students some of the educational choices now enjoyed by families of greater means. The CSP, for example, was created by the Ohio Legislature only after a federal court placed the Cleveland City School District under state control following years of mismanagement by the local school board.[9] Like most voucher programs, Cleveland's program targets students from the poorest

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5 *NAEP Fourth-Grade Reading 2000*, *supra*, at 14.

6 *Id.* at 40-41.

7 *Id.* at 38.

8 *Id.* at 30-32.

9 Rene Sanchez, *Cleveland Charts New Educational Course; State Vouchers for Poor Families Include Religious Schools as Options*, Wash. Post, Sept. 10, 1996, at A1.

families: the vouchers (called "scholarships") are focused on students from families with incomes less than two times the poverty level. *See* Ohio Rev. Code Ann. § 3313.978(A).

Numerous recent studies have demonstrated that students from the worst public schools can do better if given vouchers to attend private schools. Studies of voucher programs, of course, must be done carefully to control for the numerous variables that affect educational performance, including students' backgrounds. The most reliable studies involve programs that assign vouchers by lottery within the eligible group. This randomness allows researchers to compare the achievement of voucher recipients with that of students who applied for but did not receive vouchers (who form a valid control group because the only systematic difference between the groups is the outcome of the lottery). Seven such "random-assignment" studies of five different school-choice programs have been conducted in the past three years, and *all seven studies have found statistically significant academic benefits for at least some subgroups of the students receiving vouchers.*[10]

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[10] Paul E. Peterson et al., *School Vouchers: Results from Randomized Experiments* (June 2001) (evaluating Washington, New York City, and Dayton), *available at* http://www.nber.org/books/schools/peterson6-8-01.pdf; David Myers et al., *School Choice in New York City After Two Years: An Evaluation of the School Choice Scholarships Program, Interim Report* (Aug. 2000) (analyzing New York City), *available at* http://www.mathematica-mpr.com/PDFs/school2.pdf; Jay P. Greene, *The Effect of School Choice: An Evaluation of the Charlotte Children's Scholarship Fund* (Aug. 2000) (analyzing Charlotte), *available at* http://www.manhattan-institute.org/html/cr_12a.htm; Cecilia Elena Rouse, *Private School Vouchers and Student Achievement: An Evaluation of the Milwaukee Parental Choice Program*, 113 Q. J. Econ. 553 (1998) (analyzing Milwaukee); Jay P. Greene, Paul E. Peterson & Jiangtao Du, *School Choice in Milwaukee: A Randomized Experiment*, in *Learning from School Choice* 335 (Paul E. Peterson & Bryan C. Hassel eds., 1998) (analyzing Milwaukee).

The Harvard Program on Education Policy and Governance (PEPG), for example, analyzed three privately funded school-choice programs in New York City, Washington, D.C., and Dayton, Ohio. The Harvard PEPG study showed that, after two years in private school, African-American voucher recipients performed significantly better in each of the three cities, jumping an average of 6.3 percentile points ahead of comparable public-school students on the Iowa Test of Basic Skills.[11] Similarly, Princeton economics professor Cecilia Rouse analyzed the Milwaukee school-choice program and found that students receiving vouchers "scored 1.5-2.3 percentile points per year in math more than students in the comparison groups."[12]

In Cleveland, no random-assignment studies have been conducted. But two non-random-assignment studies in 1999—one by the Harvard PEPG researchers and one by the Indiana Center for Evaluation—found positive effects for Cleveland scholarship recipients.[13] And the most recent study of the Cleveland program found that a group of

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11 Peterson et al., *supra*, at 35.

12 Rouse, 113 Q. J. Econ. at 558, 592-93.

13 *See* Kim Metcalf, *Evaluation of the Cleveland Scholarship and Tutoring Grant Program: 1996-1999*, at 25 (Sept. 1, 1999) ("Available data indicate small but statistically significant [positive] effects on students' achievement in two of five cognitive domains (language and science) after two years in the program."), *available at* http://www.schoolchoiceinfo.org/servlets/SendArticle/45/metcalf3.pdf; Paul E. Peterson, William G. Howell & Jay P. Greene, *An Evaluation of the Cleveland Voucher Program After Two Years*, at 10, 12 (June 1999) ("[T]est score gains are observed in both math and reading between the fall of 1996 and the spring of 1998 for all students who took tests at these two points in time. . . . Parents of voucher recipients are more likely to be 'very satisfied' with nearly every aspect of the schools they attend than are parents of students in Cleveland public schools."), *available at* http://www.ksg.harvard.edu/pepg/clev2rpt.pdf.

voucher recipients, which the study tracked from kindergarten through second grade, performed "at significantly higher levels" than one control group of public-school students, although no better than a second control group.[14] No study (in Cleveland or elsewhere) has found that voucher recipients do measurably worse than students who remain in their assigned public schools.

In addition to improved learning, vouchers offer recipients social and civic benefits. Public schools are today often quite segregated by both race and socioeconomic status, in part because many parents lack meaningful school choice. Since most poor minority children must attend assigned public schools, our current educational system replicates the segregation of America's neighborhoods and extends it into the schools.

Vouchers, however, allow students to choose schools with more diverse student bodies. The CSP (like other tax-supported voucher programs) prohibits participating private schools from discriminating on the basis of race, *see* Ohio Rev. Code Ann. § 3313.976(A)(6), and the evidence from Cleveland shows that the schools there do not discriminate.[15]

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[14] Kim K. Metcalf, *Evaluation of the Cleveland Scholarship Program 1998 - 2000, Technical Report*, at 49-50 (Sept. 2001), *available at* http://www.ode.state.oh.us/comm/news/Sep_2001_news/clev4techrep.pdf. This study appears to apply a random-assignment methodology to define its second control group ("Public Applicant/Non-Recipients"), but that group is not a true random-assignment control group, since it consists not only of students who were not selected in the random lottery but also of "those whose family income was above the federal poverty level and, as a result, . . . were given low priority in the selection process and may not have been included in the lottery." *Id.* at 14 n.11. Thus, the study cannot fully isolate the effect of receiving a scholarship because other factors (such as family income) may be at work.

[15] The latest study of the Cleveland program found that, though whites were more likely to apply for scholarships than minorities, applicants

Two studies (one in Cleveland, one in Milwaukee) show that the private schools that voucher recipients attend are, in fact, more likely to be integrated than public schools.[16] In Cleveland, 19 percent of scholarship recipients attend private schools with a racial composition resembling the overall racial composition of the Cleveland metropolitan area, compared to only 5 percent of public-school students in the area.[17] Similarly, only 50 percent of voucher recipients attend schools that are almost entirely white or almost entirely minority, compared to 61 percent of public-school students in metropolitan Cleveland.[18]

Vouchers also enable recipients to attend schools that instill a sense of responsibility and civic virtues. Four recent studies have shown that, after controlling for numerous demographic variables, students in private schools show

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were still over 70 percent minority, and the racial mix of the students who received vouchers and attended choice schools was not statistically different from the racial mix of applicants who did not receive vouchers. Metcalf, *Evaluation of the Cleveland Scholarship Program 1998 - 2000*, *supra*, at 24-25; *see also* Jay P. Greene, William G. Howell & Paul E. Peterson, *Lessons from the Cleveland Scholarship Program*, in *Learning from School Choice* 357, 362 (Paul E. Peterson & Bryan C. Hassel eds., 1998) (finding that 72.6 percent of applicants were minorities and that applicants in choice schools had similar racial mix as applicants who did not receive scholarships).

16 Jay P. Greene, *The Racial, Economic, and Religious Context of Parental Choice in Cleveland* (Nov. 5, 1999), *available at* http://www.ksg.harvard.edu/pepg/parclev.pdf; *see also* Howard L. Fuller & George A. Mitchell, *The Impact of School Choice on Integration in Milwaukee Private Schools* (June 2000) (finding that 50% of public-school students in Milwaukee "attended racially isolated schools—where 90% or more of the enrollment is minority or white—compared to 30% of students at religious choice schools"), *available at* http://www.schoolchoiceinfo.org/servlets/SendArticle/6/integ600.pdf.

17 Greene, *Racial, Economic, and Religious Context*, *supra*, at 7-8.

18 *Id.*

greater tolerance, political participation, and social involvement than public-school students.[19] Harvard education professor Nathan Glazer attributes this phenomenon to the relative freedom from political pressure and bureaucracy that private schools enjoy, which he says has "enhanced their relative ability, vis-à-vis the public schools, to transmit the common culture."[20]

Whatever the reason, it is clear that—contrary to those who argue that school choice undermines America's common values—school choice promises to reduce division in American society. Harvard sociologist Christopher Jencks noted that "if racial equality is America's goal, reducing the black-white test-score gap probably would do more to promote this goal than any other politically plausible strategy."[21] Reducing that test-score gap, however, will require giving the poor (who are disproportionately members of racial and eth-

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19 *See* Jay P. Greene, Joseph Giammo & Nicole Mellow, *The Effect of Private Education on Political Participation, Social Capital and Tolerance: An Examination of the Latino National Political Survey*, 5 Geo. Pub. Pol'y Rev. 53 (1999), *available at* http://www.georgetown.edu/ publications/GPPR/; Patrick J. Wolf et al., *Private Schooling and Political Tolerance, Evidence from College Students in Texas* (Mar. 2000) (forthcoming from Brookings Institution Press in *Charters, Vouchers, and Public Education* (Paul E. Peterson & David E. Campbell eds., 2001)); David Campbell, *Making Democratic Education Work: Schools, Social Capital and Civic Education*, Education Next, Fall 2001, *available at* http://www.educationnext.org/unabridged/20013/campbell.pdf; Kenneth Godwin, Carrie Ausbrooks & Valerie Martinez, *Teaching Tolerance in Public and Private Schools*, 82 Phi Delta Kappan 542 (2001).

20 Nathan Glazer, *Seasons Change*, Education Next, Fall 2001, at 34, *available at* http://www.educationnext.org/20013/24glazer.pdf.

21 Christopher Jencks & Meredith Phillips, *Closing the Black-White Test-Score Gap*, in *Harvard Program on Education Policy and Governance 1998-99 Annual Report* 3, *available at* http://www.ksg.harvard.edu/ pepg/pepg9899.pdf.

nic minorities)[22] access to better schools. What this Court said in *Brown* is just as true today:

> [E]ducation is perhaps the most important function of state and local governments. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Brown v. Board of Educ., 347 U.S. 483, 493 (1954). School choice is an effort by elected officials, frustrated by decades of failure and inequality, to provide children with education on more "equal terms."

B. Vouchers Put Competitive Pressure on Underperforming Public Schools, Motivating Them To Improve Their Performance.

Just as important as the number of students who use vouchers to escape failing public schools is the effect that voucher programs will have on those same schools. The Ohio Legislature was entitled to conclude, in enacting the CSP, that increasing competition would improve the performance of public schools, just as competition improves performance in other sectors of the economy. In fact, the empirical evidence shows that public schools do respond favorably to competition and that vouchers, even when implemented on a rather small scale and over a short period of time, do motivate public schools to improve.

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[22] In 1998, 26.1 percent of African Americans and 25.6 percent of Hispanics were below the poverty level, compared to only 10.5 percent of whites. *See* U.S. Census Bureau, *Statistical Abstract of the United States* 476 (2000), *available at* http://www.census.gov/prod/2001pubs/statab/sec14.pdf.

The providers of educational services, like the providers of any other good or service, will work harder to improve their product when they face competition than when they enjoy a monopoly and captive consumers. No school—public or private—is immune to its comparative reputation or to the need to attract skilled teachers and administrators, ambitious students, and dedicated parents. Giving parents a school choice, through competition, is one way to replace parental apathy with energetic involvement in their children's education.

What theory predicts, experience confirms. In a series of widely respected studies,[23] Harvard economics professor Caroline Hoxby has demonstrated empirically that increasing public-school and private-school competition within a metropolitan area significantly increases the quality of public schools in that area.[24]

In one study, Hoxby found that a metropolitan area with more public school districts (what Hoxby termed more "interdistrict choice") will have significantly higher student per-

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[23] Professor Hoxby's work "inspires a kind of awe among many economists: for its clarity, its empirical thoroughness, and its wonderful ingenuity in finding ways to answer hard questions." *The difference that choice makes*, The Economist, Jan. 25, 2001, *available at* http://www.cba.uiuc.edu/seppala/econ101/hoxby.html.

[24] Caroline M. Hoxby, *School Choice and School Productivity (Or, Could School Choice Be a Tide That Lifts All Boats?)* (Feb. 2001), *available at* http://www.nber.org/~confer/2001/hoxby01/hoxby.pdf; Caroline M. Hoxby, *Does Competition Among Public Schools Benefit Students and Taxpayers?*, 90 Am. Econ. R. 1209 (2000), *available at* http://post.economics.harvard.edu/faculty/hoxby/papers/amongpub_oct2000.pdf; Caroline Minter Hoxby, *Markets and Schooling: The Effects of Competition from Private Schools, Competition Among Public Schools, and Teachers' Unions on Elementary and Secondary Schooling*, *in* National Tax Association, *Proceedings of the Eighty-Seventh Annual Conference on Taxation* 124 (1994), *available at* http://post.economics.harvard.edu/faculty/hoxby/papers/mkts_schooling_oct2000.pdf.

formance—all other things being equal—than a metropolitan area with fewer districts.[25] After controlling for various socioeconomic factors, Hoxby found that a city like Boston, which has 70 school districts within a 30-minute drive of downtown, will have "substantial[ly]" higher student achievement than a city like Miami, which has just one school district for virtually the entire metropolitan area.[26] Why? Because "[i]n a metropolitan area where one school district contains the vast majority of jobs and residences and the commute to the nearest alternative district is long, the cost of being able to exercise choice is high."[27] And where the cost of exercising choice is high, fewer parents are able to compare schools and choose the best one for their children. Without this competitive process, schools have less incentive to improve.

This same principle—that more educational choice creates more competition and higher student achievement—is demonstrated in another pair of Hoxby studies analyzing the effect of private-school competition on public schools. Hoxby found that "increasing the potential of private schools

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[25] *See* Hoxby, *Competition Among Public Schools*, *supra*. Hoxby examined competition between districts, not competition between schools in a single district. Some school districts offer parents such "*intra*district" choice through magnet schools or open-enrollment policies. These programs do give parents more options, but because it is the public school district that controls the supply of these options, the school district never faces any more competition than it chooses.

[26] Hoxby, 90 Am. Econ. R. at 1215, 1237; *see also* Hoxby, *School Choice and School Productivity*, *supra*, at 29 (concluding that schools in areas with the most inter-district choice had, compared to schools in areas with zero inter-district choice, eighth-grade reading scores that were 3.8 national-percentile points higher, tenth-grade math scores 3.1 national-percentile points higher, and twelfth-grade reading scores 5.8 national percentile points higher).

[27] Hoxby, 90 Am. Econ. R. at 1215.

to compete with public schools has a beneficial effect on public schooling outcomes."[28] More specifically, Hoxby found that after controlling for a variety of socioeconomic factors, public schools in areas with "moderately high" private-school choice do better than public schools with "moderately low" private-school choice: eighth-grade reading scores are 2.7 national-percentile points higher; eighth-grade math scores are 2.5 national-percentile points higher; and twelfth-grade reading scores are 3.7 national-percentile points higher.[29]

Vouchers increase school competition, and, perhaps more important, focus it on inner-city schools, which historically have had the most captive students and therefore have been the most insulated from competition. The effect of this competition is already apparent. Professor Hoxby's latest study shows that Milwaukee's voucher program has motivated the city's worst public schools to improve significantly in only a few years.[30] Hoxby studied Milwaukee's program because it has all the prerequisites for creating real competitive pressure on the public schools: (1) the program has operated uninterrupted for a number of years; (2) it gives public schools a financial incentive to improve by reducing funding when students transfer to private schools; and (3) it has suffi-

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28 Hoxby, *Markets and Schooling*, *supra*, at 127.

29 Hoxby, *School Choice and School Productivity*, *supra*, at 31; *see also* Hoxby, *Markets and Schooling*, *supra*, at 125 (finding that every 10 percentage-point increase in the share of a county's secondary school enrollment in parochial schools increased the average public-school student's educational attainment by .33 years and wages by 2 percent).

30 Hoxby, *School Choice and School Productivity*, *supra*, at 33-40. For a less technical presentation of Professor Hoxby's findings, see Caroline M. Hoxby, *How School Choice Affects the Achievement of* Public *School Students* (Sept. 2001), *available at* http://post.economics.harvard.edu/faculty/hoxby/papers/choice_sep01.pdf.

cient funds to allow at least five percent of public-school students to attend private schools.[31]

Professor Hoxby determined the effect of vouchers by comparing those Milwaukee public schools with the most students eligible for vouchers against those with the fewest such students. Hoxby found that in the schools where at least two-thirds of students were poor enough to be eligible for vouchers (the schools Hoxby says were most "treated" to competition), achievement in math, science, and language improved at a significantly faster rate than in schools subjected to no competition.[32] "The schools that faced the most potential competition from vouchers had the best productivity response. In fact, the schools that were most treated to competition had dramatic productivity improvements."[33]

Nor is the positive effect of private-school choice on public-school performance confined to Milwaukee. A separate study of Florida's school-choice program, which gives vouchers to students in schools that perennially fail to perform, also finds that schools threatened by vouchers show greater achievement. "[S]chools receiving a failing grade from the state in 1999 and whose students would have been offered tuition vouchers if they failed a second time achieved test score gains more than twice as large as those achieved by other schools."[34]

Dr. Howard Fuller, former superintendent of the Milwaukee Public Schools, has explained specifically how the

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31 Hoxby, *School Choice and School Productivity, supra*, at 32-33.

32 *Id.* at 39-40, 67-68.

33 *Id.* at 40.

34 Jay P. Greene, *An Evaluation of the Florida A-Plus Accountability and School Choice Program* (Feb. 2001), *available at* http://www.ksg.harvard.edu/pepg/pdf/Florida%20A+.pdf.

Milwaukee district improved in response to competition. Among other things, the school district offered parents a guarantee that if their children were not reading at grade level by third grade, the district would hire private tutors for them. J.A. 234a (Fuller Decl. ¶ 17). The district also gave a dozen public schools the flexibility to hire teachers outside the seniority system. *Id.* And the district responded to parents' longstanding requests by creating new schools with popular curricula such as Montessori. *Id.*

Just as the introduction of competition from companies like Federal Express prompted the United States Postal Service to improve its service,[35] so too vouchers are stimulating competition and pushing the public schools to improve their performance. Since voucher programs are still relatively new, public schools can be expected to make more dramatic progress in the future, as existing voucher programs are given more time to work and as new, even more effective voucher programs are designed and implemented.

Justice Brandeis called states the laboratories of democracy. "It is one of the happy incidents of the federal system," he wrote, "that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). He warned, however, that "[t]his Court has the power to prevent an experiment" and that "in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles." *Id.* The laboratories of democracy are now percolating with bold

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[35] Postmaster General Marvin Runyon stated that "[c]ompetition is giving us plenty of incentive to improve. It's making us realize that if we're to be an innovative leader in the communications industry, we've got to get out there and compete for every postal dollar we get." *Privatize the Postal Service*, Cato Policy Report (Sept./Oct. 1995), *available at* http://www.cato.org/pubs/policy_report/pr-so-po.html.

school-choice experiments, and these reforms are yielding very promising early results, as shown by the educational achievement gains already made by low-income and minority students in choice programs. In the interest of more equal educational opportunity and increased academic achievement, these experiments should be permitted to continue.

II. THE CLEVELAND SCHOLARSHIP PROGRAM DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

The purposes of the Cleveland Scholarship Program are secular: to improve educational opportunity for students who are trapped in poorly performing assigned public schools by their lack of family resources and to improve those schools themselves through the stimulus of increased competition. *See* Ohio Rev. Code Ann. § 3313.975 (authorizing scholarships only in districts "under federal court order requiring supervision" by the state).[36] On its face, the CSP is neutral with respect to religion: all students in the Cleveland district are eligible to apply for the scholarships, and no preference is given to children based on religion; the only statutory preference is for students from low-income families, *see id.* § 3313.978(A); students are free to choose non-religious schools or religious schools of any denomination, *see id.* §§ 3313.976(A), (C), 3313.978(A)(1), (2); the schools, however, must accept scholarship students without regard to a student's religious affiliation and must select new scholarship students by lottery, *see id.* §§ 3313.976(A)(4), (6),

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[36] The district court acknowledged that the CSP has valid secular purposes, *see* 72 F. Supp. 2d 834, 847, 864 (N.D. Ohio 1999), and the court of appeals did not disturb this finding. *See also Simmons-Harris v. Goff*, 711 N.E.2d 203, 208 (Ohio 1999) ("Nothing in the statutory scheme, the record, or the briefs of the parties suggests that the General Assembly intended any [religious] result.").

3313.977(A).[37] Finally, the selection of the schools the students will attend, which will therefore be the ultimate recipients of the scholarship funds, is made by parents of students, as a matter of individual private choice. *See id.* §§ 3313.978(A)(1), (2), 3313.979.

Under this Court's modern Establishment Clause jurisprudence, a state program passes constitutional muster if it (a) has a secular purpose; (b) is neutral with respect to religion on its face and as applied; and (c) is so designed that any benefits that ultimately reach sectarian institutions do so through the mechanism of genuine individual private choice. That is the clear position of a majority of the Court in *Mitchell v. Helms*, 530 U.S. 793 (2000), in which the Court upheld a state program providing "secular" materials and equipment to public, private, and parochial schools, allocated on the basis of enrollment. In reaching that result, the plurality opinion of Justice Thomas (for four Justices) said, "If aid to schools, even 'direct aid,' is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any 'support of religion.'" *Id.* at 816 (citation omitted). The concurring opinion of Justice O'Connor (for herself and Justice Breyer) disagreed that in the case of direct aid a mere "figurative" passage through private hands, such as allocation of aid on a per-capita basis after private selections of schools have been made, would be sufficient; but the concurrence accepted the principle established in *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986), that benefits may reach a religious school if "the aid [is] provided directly to the individual student who, in turn, ma[kes] the choice of where to put

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[37] The CSP thus does not directly or indirectly "define its recipients by reference to religion." *Agostini v. Felton*, 521 U.S. 203, 234 (1997).

that aid to use." *Mitchell*, 530 U.S. at 841 (O'Connor, J., concurring). A program satisfies the requirements of the Establishment Clause on this point if "'any aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of [individual] aid recipients.'" *Id.* (quoting *Witters*, 474 U.S. at 487).

The CSP involves the actual individual private choice of schools that the concurring opinion in *Mitchell* would require, and it therefore meets the standards articulated by the six Justices who joined in the judgment in that case. Nevertheless, the courts below raised four grounds of objection: (1) the aid reaching schools is not limited to secular uses but may support religious instruction and activities; (2) the CSP is non-neutral because it is available only to students attending private schools; (3) the CSP is non-neutral because most of the schools willing to participate in fact have religious affiliations; and (4) the case is controlled by *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). None of these objections survives close inspection.

(1) *Secular Uses*

Both the district court, *see* 72 F. Supp. 2d at 847-48, and the court of appeals, *see* 234 F.3d 945, 958-59 (6th Cir. 2000), expressed concern that funds made available through students to private religious schools under the CSP are not limited to "secular uses" but may be used by the school to support a school's religious programs and activities. But whatever relevance the secular-vs.-religious nature of the ultimate uses of the aid may have in other contexts, it is surely irrelevant to religion-neutral programs involving actual individual choice. If a student selected on a strictly neutral basis makes a genuine individual choice to attend a parochial school, the *government* is not supporting the school's religious activities, either actually or apparently; it is merely allowing the student to attend the school that provides a combination of instruction and other programs that he chooses.

The government should *not*, as a matter of either constitutional law or sound public policy, be dictating the content of programs at the selected schools.

Witters, *supra*, is squarely in point. The State of Washington had a religion-neutral program of monetary vocational assistance to the blind, to be spent at an institution of the blind beneficiary's choosing. Petitioner Witters' choice was bible studies at a Christian college, looking toward a career in religious work. There was no dispute that the state aid to Witters would ultimately be put to use to support religious instruction: that is precisely what Witters wanted it for. But the Court, per Justice Marshall, ruled that Witters could receive such aid: the Court noted that the aid "is paid directly to the student," that the aid to the blind is "made available generally without regard to the sectarian-nonsectarian . . . nature of the institution benefited," and that aid would flow to the religious institution only as a result of Witters' genuinely independent and private choice, 474 U.S. at 488 (citation omitted), so that "the decision to support religious education is made by the individual, not by the State," *id.* That is the situation in Cleveland.

Other examples abound. The federal government has made financial aid available to individuals under various programs to help them pay for higher education. *See* 38 U.S.C. § 3011 *et seq.* (G.I. Bill); 20 U.S.C. § 1070a *et seq.* (Pell Grants). The individual recipients are free to use them at qualified institutions of their own choosing, including sectarian institutions,[38] and the institutions are free to treat the

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[38] "Veterans receiving money under the 'G.I.' Bill of 1944 could attend denominational schools, to which payments were made directly by the government. During World War II, federal money was contributed to denominational schools for the training of nurses. The benefits of the National School Lunch Act are available to students in private as well as public schools." *Engel v. Vitale*, 370 U.S. 421, 437 n.1 (1962) (Douglas, J., concurring) (internal citations omitted).

payments they receive as part of their general revenues. No one has ever seriously suggested that individual recipients should *not* be allowed to spend their assistance at, say, Holy Cross, or that Holy Cross must somehow segregate the tuition and other payments it receives from them and spend such funds only on secular activities. On the contrary, either restriction would raise obvious severe problems under the Free Speech and Free Exercise Clauses. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829-37 (1995); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532 (1993); *Quick Bear v. Leupp*, 210 U.S. 50, 82 (1908). In sum, where an aid program is neutral and operates through private individual choices, there is no room for a separate constitutional test based on the ultimate use of the funds.

(2) *Limitation to Private Schools*

Both the district court, *see* 72 F. Supp. 2d at 864, and the court of appeals, *see* 234 F.3d at 959-60, also expressed concern that the CSP discriminates in favor of *private* schools. But that assertion, whatever its constitutional relevance, is simply false in several senses: (a) The eligible students are for the most part *public*-school students[39] with family incomes below a specified level, an entirely neutral class. *See* Ohio Rev. Code Ann. § 3313.978. (b) The public school students who receive scholarships may use them, under the statute, to attend either a private school or another public school (although the CSP does not require public schools to participate as in-takers of such students, and to date no public school has elected to do so). *See id.* § 3313.978(A)(1), (2).

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[39] In the CSP's first year, only 25 percent of the scholarship recipients (496 of 1989) had previously attended private schools. *See* Jay P. Greene, William G. Howell & Paul E. Peterson, *Lessons from the Cleveland Scholarship Program*, in *Learning from School Choice*, *supra*, at 362; *id.* at 359.

(c) The State supports public schools and secular private schools with far more funds, per student, than the scholarships made available under the CSP;[40] students are thus in no way induced to choose private schools by the prospect of greater state financial support than they would receive if they remained in their assigned public schools; the scholarship student's only logical reason for changing schools is to attend what he and his family judge to be a *better* school. (d) The CSP itself benefits public schools, both by reducing their expenses as scholarship recipients elect to go elsewhere, and by providing the stimulus of competition. There is no sense in which the State's educational programs favor private education. What they favor is giving students trapped in poorly performing assigned public schools an additional education choice.

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[40] Compared to the up to $2,250 that the State provides each student attending a private school under the CSP, the State would provide both the scholarship *and* the State's ordinary per-pupil aid contribution (called "state base cost funding" and up to approximately $4,800 this year) for a student attending a public school under the CSP. *See* Ohio Rev. Code Ann. §§ 3313.979(B), 3317.02(B), 3317.03(I)(1), 3317.012(A), 3317.022(A). For students in the State's secular charter schools (called "Community Schools"), the State provides the entire $4,800 ordinary per-pupil contribution. *See id.* §§ 3314.03(A)(15), 3314.08(A)(1), (D)(1), 3317.02(B); *see generally* J.A. 56a (Hoxby Aff. ¶ 4). And for students attending assigned public schools in Cleveland, the State's ordinary per-pupil expenditure of up to $4,800 is supplemented by local government funds to create an overall per-pupil expenditure that exceeded $6,300 in 1997-98. *See* Ohio Dep't of Educ., *Current Expenditures Summary and Other Expenditures, Public Elementary and Secondary Education, 1997-98 Revised* (Mar. 26, 1999), *available at* http://ode000.ode.state.oh.us/www/ims/costpp/table2_98.txt; *see also* Ohio Dep't of Educ., *Tax Valuation and Current Revenue Receipts by Source, Public Elementary and Secondary Education, 1997-98* (Mar. 26, 1999), *available at* http://ode000.ode.state.oh.us/www/ims/costpp/table3_98.txt.

(3) *The Number of Religious Schools*

Both the district court, *see* 72 F. Supp. 2d at 863, and the court of appeals, *see* 234 F.3d at 959, also suggested that since the great majority of private schools now willing to accept scholarship students are religious schools, the CSP is effectively encouraging religious rather than secular education.

First, this suggestion confuses the external facts of the moment with the CSP as established by statute. The program itself is neutral with respect to the religious or non-religious character of the participating schools, and the larger number of pre-existing religious schools who have elected to participate is neither a deliberate nor a permanent result. The court of appeals suggests darkly that the CSP fits the financial requirements of religious schools better than it fits the needs of secular private schools, 234 F.3d at 959, but there is no evidence and no district-court finding that the Ohio Legislature devised the program in a way that, despite its facial neutrality, would favor the creation, or growth, or student selection of religious rather than secular schools.

Second, there is no evidence or finding that any scholarship recipient seeking to attend a secular rather than religious private school has been unable to find such a place.

Third, there is every reason to assume that more secular schools will be created and will grow to serve the needs of scholarship recipients, as well as other students who wish to attend them, now that the State has given more students an opportunity to escape from their assigned public schools. The CSP is relatively new and has been under continuous legal challenge since its inception, discouraging initiatives to create new secular schools for the students the CSP serves. The number of participating secular schools rose sharply in

Milwaukee once the Wisconsin Supreme Court upheld that city's voucher program.[41]

In sum, the fact that for reasons of history a large fraction of the alternatives now available to students trapped by poverty in assigned public schools are sectarian is not a reason to refuse to give such students a choice. When there are customers able to choose, additional suppliers of educational services will come forward to serve them: that is the way competition works, in education as in everything else.

(4) *Nyquist*

Finally, both the district court, *see* 72 F. Supp. 2d at 850, and the court of appeals, *see* 234 F.3d at 955, felt bound by this Court's opinion in *Nyquist*, *supra*, to strike down the CSP. Lower federal courts are of course not at liberty to decide for themselves that one of this Court's decisions, never explicitly overruled, has been overtaken by events. This Court does have that prerogative, and if the Court agrees that *Nyquist* would otherwise be controlling, the Court can and should overrule it as inconsistent with the Court's modern approach to the Establishment Clause. But *Nyquist* is also distinguishable, because it did not involve individual private choice *after* a grant was made.

Nyquist focused, as a matter of analytical structure, on the use to which the state aid was put. The Court first exam-

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[41] The Milwaukee program began in 1990-91 with only 7 participating secular private schools. *See* Wisconsin Legislative Audit Bureau, *An Evaluation: Milwaukee Parental Choice Program*, Report 00-2, at 14, 26-27, App. I, VII (Feb. 2000), *available at* http://www.legis.state.wi.us/lab/reports/00-2full.pdf. After the final legal challenge to the secular component of the program ended in 1992, *see Davis v. Grover*, 480 N.W.2d 460 (Wis. 1992), the number of participating secular schools increased to 23 by 1998-99. *See Evaluation*, *supra*, at 14, 16, App. I. Of those 23 schools, 4 were founded between 1990 and 1995, and 9 were founded between 1996 and 1998. *Id.* at App. I; *see also* J.A. 235a (Fuller Decl. ¶ 18).

ined a provision of the New York statute there at issue that "authorize[d] direct payments to nonpublic schools, virtually all of which are Roman Catholic," for purposes of assisting the maintenance and repair of school facilities but "largely without [any] restrictions on usage." 413 U.S. at 774. The repair and maintenance grants were measured by the pupil population, but there was no active individual choice in deciding which institutions would receive payments. The Court struck down these direct, unintermediated grants on the ground that the grantees were free to use them for sectarian purposes.

The Court then followed a parallel analysis to strike down provisions authorizing reimbursement of some tuition expenses incurred by low-income parents. The Court said the amounts granted could not have been given directly to sectarian schools to be used for unrestricted (including sectarian) purposes, *see* 413 U.S. at 780, and, the Court said, the program was not saved by the fact that the grants went to parents, rather than to the schools themselves, because the Court's cases sustaining programs of grants to parents, *Everson v. Board of Education*, 330 U.S. 1 (1947), and *Board of Education v. Allen*, 392 U.S. 236 (1968), were distinguishable.

At least as applied to the present case, the Court's *Nyquist* approach starts at the wrong end. It is now clear that as long as a grant program is neutral as respects religion and involves actual individual private choice in the determination of the ultimate recipients of funds, the program does not have the impermissible effect of government enhancement of religion. The reason is not that the money is somehow carefully boxed to avoid supporting sectarian activities (a result that the fungibility of money makes unrealistic in any event) but that the private choice of individuals, rather than any decision of the government, is providing whatever enhancement those activities enjoy. The Court began following this approach of looking at the structure of the program, rather than

the ultimate use of any particular dollars, even before *Nyquist*. *See Walz v. Tax Comm'n*, 397 U.S. 664 (1970); *see also Lemon v. Kurtzman*, 403 U.S. 602, 621 (1971) (distinguishing *Everson* and *Allen* on the ground that in those cases "state aid was provided to the student and his parents—not to the church-related school"). The Court has repeatedly followed the same approach since, *see Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters*, *supra*, and the Court should follow it here.

CONCLUSION

The decision of the U.S. Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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